No. 80-709

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

MINWER A. BADWAN and RAWHI A. BADWAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should go beyond the general foundation set forth in Ungar v. Sarafite and establish specific guidelines for determining minimum preparation time in criminal cases to comply with due process and meaningful exercise of the right to counsel.

II. Whether forcing a defendant to trial twenty-two days after presentment deprives him of due process, effective assistance of counsel and other constitutional rights in a complex, multi-count tax case involving three tax years and nine tax returns, where:

a. The government was actively investigating and preparing the case for four years;

b. The government's evidence consisted of hundreds of documents, with thousands of entries to support its complex net-worth and bank-deposits theories of proof;

c. The government did not permit the

defendants to copy, pre-trial, its most critical exhibits;

d. An accounting firm hired by the defense certified to the trial court in writing that it was unable to complete an analysis of the government's exhibits in the time allotted;

e. The prosecution brought the case at the height of the tax season;

f. Defendants had previously given the government all their books and records, and did not retain copies;

g. The tax returns were prepared by an independent, professional bookkeeping service, not by the defendants themselves;

h. Defendants were not represented by counsel prior to indictment;

i. The defense attorney had no prior familiarity with the defendants or the case;

j. Defendants lived outside of the forum state hundreds of miles from the place of indictment and the offices of their counsel;

k. Two requests for the continuance were made pre-trial and in writing;

No prior continuances were requested or granted;

l. The defense attorney demonstrated to the judge, as early as arraignment, that he was an active trial practitioner with other court obligations, and

m. The requested continuance of three to four weeks would have resulted in no prejudice to the Court, government counsel or government witnesses.

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No._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1980

MINWER A. BADWAN
and
RAWHI A. BADWAN,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners Minwer A. Badwan and Rawhi A. Badwan respectfully pray that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Fourth Circuit entered August 29, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix hereto [12a]. No opinion was rendered by the United States District Court for the Eastern District of Virginia.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 26, 1980. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 29, 1980, and this Petition for a Writ of Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, or be be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 U.S.C. 7206(1)):

Fraud and false statements
Any person who--

(1) Declaration under penalties of perjury.-- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;...shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years or both, together with the costs of prosecution.

18 U.S.C. 3161, Speedy Trial Act.
Reproduced in full, Appendix p.75a

STATEMENT OF THE CASE

After four years of investigation and preparation on the part of the government, the case against the Badwans culminated in the return of a nine-count indictment on March 5, 1979 in U.S. District Court for the Eastern District of Virginia for violations of 26 U.S.C. 7206(1) (filing false tax returns). The indictment covered the tax years 1972,

1973 and 1974 and involved three partnership returns and six individual returns for those years. Four days later (Friday, March 9), the Badwans, residents of North Carolina, retained counsel who had no prior familiarity with the case or the defendants. Prior to March 9, they were unrepresented by counsel. One day after retaining counsel, they journeyed to Arlington, Virginia to meet with him, principally to discuss securing bail at their presentment and arraignment the following Monday, March 12, 1979.

At their presentment and arraignment the District Court (the Honorable Albert V. Bryan, Jr., presiding) ordered that pre-trial motions be filed by March 21 (nine days later), and heard eleven days after arraignment (March 23), and trial by jury was set for April 3 (twenty-two days after arraignment). The trial court attempted to set trial first sixteen days and then nine days after arraignment. Previous court obligations of defense counsel precluded the setting of trial on these earlier dates.

The prosecutor met with counsel two days after arraignment (March 14). It was then that counsel learned for the first time that the government had eight volumes of trial exhibits that it intended to use at trial. He was at that time given copies only of his client's statements; later he was allowed to copy only some of the documents which had been furnished by his clients. His request to copy other documents central to the government's case was refused. On March 16, the prosecutor invited counsel to meet on March 20 with the special agent investigating the case.

In the interim, counsel met with his clients on Saturday, March 17. After reviewing the status of the case with them, it became apparent that proper pre-trial preparation would require the employment of a certified public accountant. On Monday, March 19, five days after discovery began, counsel contacted a certified public accounting firm and arranged to meet with them on March 23.

On March 20, eight days after arraignment, counsel filed a written motion for a continuance. That motion set forth that it was impossible for counsel even to gather all necessary materials, much less review them, prior to the date for the filing of motions (March 21); furthermore, only after the materials were obtained, could an accountant begin working with counsel to prepare the case for trial. Counsel asked for additional time in which to file motions and a continuance of the trial date from April 3 to a date in late April or early May. The District Court denied the motion by order, without comment, on the same day it was filed. Also on that day, the prosecutor advised counsel that he could copy some, but not all, of the government exhibits that were requested by the defense to facilitate pre-trial preparation. The most critical exhibits which counsel was not permitted to copy were the IRS agent's lengthy and complicated reconciliations of defendants' bank transactions which contained the crux of the government's evidence at trial.

Counsel met with the accountant on March 23, and the next day (Saturday) the accountant, himself a former IRS agent, spent two and one-half hours reviewing the documents at the prosecutor's office. As a result of the review, the accountant, although unable to reach a conclusion as to the accuracy and validity of the government's computations, did conclude that he could not perform his function in the time remaining for trial. By his letter dated March 29, the accountant stated that it was his professional opinion that "it would take several weeks to perform a thorough review of the government's calculations." He emphasized that there were in excess of one hundred exhibits and thousands of entries relating to nine United States tax returns filed during a three-year period.

On the day of trial (April 3), counsel informed the Court that the defense was not ready for trial and filed another written motion for a continuance or in the alternative, a motion to dismiss the indictment for

failure to grant adequate time to prepare for trial. It set forth the reasons previously assigned and added that, while the government purported to rely on the bank deposits method of proving the indictments there were indications that the net worth system was being used, and neither counsel nor the accountant was afforded an opportunity to analyze the case in this light. The accountant's letter of March 29 was attached to the motion. The District Court summarily denied the motion, and it is inferable from the record that the motion was never read.[1]

Thereafter the trial immediately began. The government's case consisted of the testimony of twelve witnesses. The prosecution was handled by three attorneys, one of whom was the U.S.

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1. The remarks of the district judge were directed solely to an accompanying motion to suppress. There was a respectful request from counsel that the Court read "at some appropriate time" the motion for continuance and the accountant's letter. The district judge never asserted familiarity with either.

Attorney. The special agent in charge of the investigation was given permission to sit at counsel table with the prosecutors.

Defense objections were few. There was some cross-examination of the government's witnesses, relating only to peripheral matters such as the agent's Miranda warnings; no witnesses were called for the defense. In the cross-examination of the government witnesses, there were no questions relating to the substance of the government's bank deposits/cash expenditures analysis. Throughout the trial, defense counsel repeatedly informed the Court that he had never even seen copies of many of the exhibits from which government witnesses were testifying. The District Court repeatedly criticized the government for its failure to make evidence available to the defense and for the government's disorganized presentation, and stated that "this is one of the sloppiest cases I have ever seen."

The defendants were convicted on all counts of the indictment, and they appealed. The convictions were affirmed

by a divided panel of the Court of Appeals, and a petition for re-hearing was denied, with one judge dissenting. The suggestion for re-hearing en banc was disregarded since no judge requested a poll.

A Stay of Mandate was denied, but the District Court postponed execution of the defendants' incarceration until the outcome of proceedings in this Court.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari in this case should issue to give this Court the opportunity to settle the important question of federal Constitutional Law, namely, how quickly may a criminal defendant be forced to trial? Furthermore, this Court should resolve the divergence and ambiguity in the Circuits concerning the standards to be applied when a defendant claims inadequate time to prepare for trial.

I. THE UNGAR v. SARAFITE LAISSEZ-FAIRE APPROACH TO DETERMINE ADEQUATE CRIMINAL PREPARATION TIME, AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW, SHOULD BE ABANDONED.

Ungar recognized that if a defendant does not have sufficient time to prepare for trial, all the constitutional rights given to the status of a criminal defendant become a charade and a parody of due process, and the trial itself is nothing more than "an empty formality." Ungar v. Sarafite, 376 U.S. 575,589 (1964).

This approach can also be found in earlier cases:

> The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. Powell v. Alabama, 287 U.S. 45,59 (1932)

And:

> the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. Avery v. Alabama, 308 U.S. 444,446 (1940)

As recently as 1972, this Court said in another context:

> the establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. Stanley v. Illinois, 405 U.S. 645,656 (1972).

It is respectfully submitted that this Court, and the courts below, have not effectively protected the "fragile values of a vulnerable citizenry" in matters of adequate time to prepare a criminal defense.

Despite these glowing acknowledgements of the right to prepare for trial, Ungar delegated complete unguided discretion to trial courts on the theory that "there are no mechanical tests" 376 U.S. at 589.

This Court has never structured a concrete framework setting forth the factors, issues and standards which due process and right to counsel require a trial court to consider in exercising its discretion. For example:

-- Should there be an initial minimum period given an accused to prepare his case for trial?

-- Should that minimum period vary depending on the seriousness or complexity of the charges?

-- Should a defendant be required to establish need or show prejudice in order to justify whatever initial preparation period is mandated by due proces and right to counsel?

-- What kind of inquiry, hearing or proffer is required in the trial court to dispose properly of a request for a continuance?

-- What legitimate considerations may be considered by a trial court in determining how long a defendant must be allowed to prepare for trial?

-- What order of priority and what degree of significance should be attached to the various considerations which a trial court should or must consider?

-- To what degree should the exercise of discretion by a trial court focus only on the defendant's ability to demonstrate prejudice, and to what extent should it involve balancing the defendant's needs for adequate trial preparation against possible prejudice to the court, government or witnesses?

-- What standard of proof must a defendant meet to convince a trial court that a continuance is needed?

-- How, and to what extent, must a defendant demonstrate prejudice from the denial of a continuance request?

-- To what extent are a defense attorney's trial schedule and other professional obligations relevant considerations in evaluating a continuance request?

The Ungar approach which addressed none of these issues is inadequate.

Under the present state of the law, no meaningful guidance is provided. It is true, but obvious, that convictions are usually reversed where virtually no time was afforded for preparation. Townsend v. Bowmar, 351 F.2d 499 (6th Cir. 1965) (notification of indictment, appointment of counsel and trial all on the same day); United States v. Helwig, 159 F.2d 616 (3rd Cir. 1947) (one minute before trial); Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978) (unprepared partner of retained counsel who purposely absented himself from trial without court intervention); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967) (less than one day to prepare); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1956) (less than one day).

Where more than one day of pre-trial preparation is afforded, courts are extremely reluctant to find an abuse of discretion in refusing to grant a continuance. In United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976), the Court found ten days an adequate

amount of time to prepare for trial in a conspiracy to commit bank robbery case.

One full week was held adequate to prepare for a two-count robbery case, and the court found a continuance denial proper in Spaulding v. United States, 279 F.2d 65 (9th Cir. 1960.)

Six days to prepare for trial was found to be adequate by the Eighth Circuit, and a denial of a continuance motion was not an abuse of discretion. United States v. Webb, 533 F.2d 391 (8th Cir. 1976).

This case is a typical example of the inadequacy of the present approach by both this Court and the Circuit Courts of Appeals in dealing with the forced trial problem.

The Badwans were simply not given adequate time to prepare. Due process requires an adequate and reasonable length of time for preparation irrespective of whether that time bears fruit. The government had the benefit of four years of actual preparation; at trial three full-time prosecutors were needed for presentation, yet the trial judge characterized the government's

presentation as "one of the sloppiest cases I have ever seen." By contrast, the defendants had one day in excess of three weeks to prepare for a jury trial in response to the government's massive investigations leading to a nine-count indictment. Neither at trial, nor on appeal, has the government asserted any reason why the government, the trial court, or any witnesses of any party would have been prejudiced in any way by the short continuance requested. Yet, a Court of Appeals found that the denial of a continuance was the proper exercise of judicial discretion. Manifestly, due process in this circumstance requires more meaningful scrutiny of the mandate of due process and right to counsel in this area.

In regard to criminal trial practice in the federal courts, further consideration of the Ungar approach is called for in light of the Speedy Trial Act, 18 U.S.C. 3161. That Act, which went into effect fully on July 1, 1980, requires early disposition of federal criminal cases. For example, the Act requires trial within seventy days after the filing of an indictment or the client's

first appearance before a judicial officer, whichever occurs last. 18 U.S.C. 3161(c)(1).

A recent amendment to that Act prohibits trials within thirty days after arraignment without the consent of the defendant. The underlying constitutional questions and the issues set forth above are not addressed by the Act.

The guidance for lower courts being sought here is no more than that provided by this Court in the areas of speedy trial, search and seizure and confessions. Yet, the denial of adequate preparation time is more worthy of this Court's attention than any other Consititutional claim since its denial extinguishes virtually all basic Constitutional rights of the criminal accused.

II. THE LACK OF UNIFORMITY IN THE CIRCUITS OVER THE STANDARDS TO BE USED IN CONSIDERING REQUESTS FOR ADEQUATE PREPARATION TIME SHOWS THE NEED FOR FURTHER ACTION BY THIS COURT.

The only requirement in the Second Circuit is that the decision on a continuance be "reasonable." United States v. Carroll, 510 F.2d 507,510 (2nd. Cir. 1975).

In the Eighth Circuit, trial courts are required to balance the nature of the case (complicated or uncomplicated), the diligence of the party requesting a continuance, the conduct of the opposing party, the effect of the continuance, and the asserted need for a continuance. United States v. Little, 567 F.2d 346,348 (8th Cir. 1977).

The District of Columbia Circuit has set out the factors in considering a continuance to include:

> "...the length of the requested delay; whether other continuances have been requested or granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel and to the court; whether the requested delay

> is for legitimate reasons, or whether it is dilatory, purposeful or contrived; whether the defendant contributed to the circumstance which give rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and, if so, whether the prejudice is of a material or substantial nature; the complexity of the case, and other relevant factors which may appear in the conduct of any particular case." United States v. Burton, 584 F.2d 485,490-91 (D.C. Cir. 1978)

The Fifth Circuit directs its courts to assess: "...the quantum of time available for preparation, the likelihood of prejudice from denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, and the availability of discovery from the prosecution." Additionally, courts should look at "the adequacy of the defense actually provided at trial , the skill and experience of the attorney, any pre-employment or pre-retention experience of the attorney with the

accused or the alleged crime, and any representation of the defendant by other attorneys that accrues to his benefit." United States v. Uptain, 531 F.2d 1281,1286-87 (5th Cir. 1976).

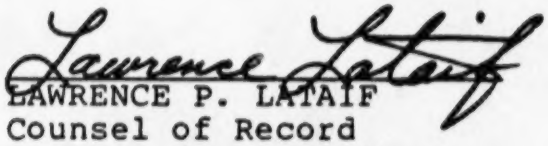
The Fourth Circuit, in the instant case seems to adopt the Uptain standard [21a-22a], although other cases in that Circuit adopt different approaches. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975); United States v. Inman, 483 F.2d 738 (4th Cir.), cert. denied, 416 U.S. 988 (1973); United States v. Bragan, 499 F.2d 1376 (4th Cir. 1974).

It is clear, then, that a uniformity of approach is lacking in the Circuits.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully Submitted,



LAWRENCE P. LATAIF
Counsel of Record
Counsel for Petitioners

Peter L. Sissman
Of Counsel

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA

UNITED STATES OF AMERICA	)
V.	NO. 79-32-A
MINWER BADWAN	)
UNITED STATES OF AMERICA	)
V.	NO.79-33-A
RAWHI A BADWAN	)

ORDER

UPON CONSIDERATION OF the Motion for Extension of Time Within Which to File Pre-Trial Motions and Motion for Continuance of Trial Date filed by the Defendants in the above-entitled cases,

It is hereby ORDERED this ___ day of March, 1979, that an extension of time up to and including April 2, 1979 is hereby granted to the Defendants for the filing of pre-trial motions.

It is further ORDERED that the trial of this matter presently scheduled for Tuesday, April 3, 1979 is continued to _____, 1979.

SO ORDERED this _____ day of March, 1979.

DENIED
March 20, 1979

/s/ Albert V. Bryan, Jr.
U.S. District Judge

I ASK FOR THIS:

/s/

LAWRENCE P. LATAIF
Suite 407 N. Uhle St.
Arlington, Virginia 22201
527-7750

DENIAL OF SECOND MOTION FOR CONTINUANCE
TRIAL TRANSCRIPT
APRIL 3, 1979
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THE COURT: At arraignment there was a time given within which to file motions and a time set for those motions No motion was filed within that time. And I am unwilling to hear any motion to suppress evidence on the morning of trial with a jury sitting here waiting, and I am unwilling to continue the matter.

For those reasons, the motion will be denied.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	
V		CRIMINAL NO.
	)	79-32-A
MINWER BADWAN,	)	
Defendant	)	

UNITED STATES OF AMERICA	)	
	)	
V		CRIMINAL NO.
	)	79-33-A
RAWHI BADWAN,	)	
Defendant	)	

O R D E R

Upon consideration of the defendants' Motion for New Trial, Motion for Judgment of Aquittal and Motion to Dismiss Multiplicitous Counts of the Indictment, counsel for the defendants having waived oral argument, it is hereby

ORDERED that the motions be denied.

/s/ Albert V. Bryan Jr.

Alexandria, Virginia
April 18, 1970

UNITED STATES DISTRICT COURT for
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Docket No. 79-33-A

UNITED STATES OF AMERICA

v.

RAWHI A. BADWAN

JUDGMENT AND COMMITMENT ORDER

05/04/79

with counsel LAWRENCE P. LATAIF

PLEA not guilty

FINDING & JUDGMENT

Defendant has been convicted as charged of the offenses of False tax return - T.26 USC 7206(1) Counts 1, 2, 3, and 4.

SENTENCE

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years as to Count 1, and on the

conditions that the defendant be confined in a jail type institution for a period of six (6) months, the balance of the sentence is suspended and the defendant is placed on probation with supervision for a period of three (3) years. As to each of Counts 2, 3, and 4, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years. Execution of said sentence of imprisonment as the Counts 2, 3, and 4, is suspended and the defendant is placed on probation with supervision for a period of three (3) years as to each of Counts 2, 3, and 4. Said sentences of probation in Counts 2, 3, and 4 shall run concurrently with probation in Count 1. The defendant is directed to pay for the costs of prosecution, the amount and manner of payment to be determined by the Probation Officer.

Defendant s released on bond pending appeal.

/s/Albert V. Bryan, Jr.
U.S/ District Judge

Date: 05-04-79

UNITED STATES DISTRICT COURT for
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division
Docket No. 79-33-A

UNITED STATES OF AMERICA

v.

RAWHI A. BADWAN

JUDGMENT AND COMMITMENT ORDER

05/04/79

with counsel LAWRENCE P. LATAIF

PLEA not guilty

FINDING & JUDGMENT

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·Defendant is released on bond pending appeal.

/s/

Albert V. Bryan, Jr.
U.S. District Judge

Date 05-04-79

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5144

United States of America,

Appellee,

versus

Minwer A. Badwan,

Appellant,

No. 79-5145

United States of America,

Appellee,

versus

Rawhi A. Badwan,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued March 6, 1980
Decided June 26, 1980

Before WINTER, BUTZNER and PHILLIPS, Circuit Judges.

Lawrence P. Lataif for Appellants; Daniel J. Conway, Assistant U.S. Attorney, Jerel Ikuo Yamamoto, Third Year Law Student, (Justin W. Williams, U.S. Attorney; Leonie M. Brinkema, Assistant U.S. Attorney; Daniel M. Cisin, Third Year Law Student on Brief) for Appellee.

PHIILLIPS. Circuit Judge:

Minwer Badwan and Rawhi Badwan appeal their convictions under 26 U.S.C. Sec.7206(1) for filing false federal income tax returns. They raise three issues on appeal: the denial of their motions for a continuance of the trial date, the denial of their untimely motion to suppress evidence, and the sufficiency of the evidence to prove all elements of a violation of 26 U.S.C. Sec. 7206(1). We disagree with their contentions on each of these points and affirm.

I.

The appropriate standard and perspective for review of a denial of a motion for a continuance is found in Ungar v. Sarafite, 376 U.S. 575 (1976):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable

> request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Id. at 589 (citations omitted) (emphasis supplied).

The denial of the Badwans' motions for a continuance is the most troublesome issue presented by this case. Viewed from the perspective of the district court at the time it denied the motions, however, we cannot say that the district court abused its discretion.

A.

Minwer and Rawhi Badwan are brothers and were the sole partners in Virginia International Trading Company. ("VITC"). On March 5, 1979, a federal grand jury sitting in Alexandria, Virginia returned a five count indictment against Minwer Badwan and a four count indictment against Rawhi Badwan. Each was charged with filing false individual

tax returns for the years 1972, 1973 and 1974. In addition, Minwer Badwan was charged with two counts and Rawhi Badwan with one count for filing false partnership tax returns for those same years.

On March 12, 1979, the Badwans appeared with retained counsel before the district court for arraignment. They pleaded not guilty and demanded a jury trial. The district court set the case for trial on April 3, 1979. All pretrial motions were to be submitted by March 21 and heard on March 23. With full opportunity to do so, defense counsel raised no objections to these dates. At oral argument in this court counsel explained that he did not object because he had not yet had a chance to review the evidence in the case. In addition, he said, he knew that the district court was not favorably disposed to grant motions for continuance.

On March 20, counsel filed a motion for an extension of time within which to file pre-trial motions and for a continuance of the trial date. In the

motion, counsel represented that he had not been retained until March 9, so he had had no chance to investigate or research the case before indictment. On March 14 he had first met with an Assistant United States Attorney to begin pre-trial discovery. At that meeting counsel was presented "eight volumes of trial exhibits covering hundreds if not thousands of pages." On March 16, the government attorney had called defense counsel to invite him to meet with the I.R.S. agent in charge of the investigation. A meeting had been arranged for March 20. On March 17, counsel had met with the Badwans and decided that a defense investigation would be necessary. The investigation would include the hiring of an accounting firm to review the available materials.

The motion concluded:

> In light of the complexity of the case (e.g., the number of Government exhibits and the fact that the indictment covers nine different tax returns over a period of three years) counsel is compelled to request the additional time within which to file motions and a continuance of

the trial date from April 3 to a date in late April or early May.

The district court denied the motion. On the morning of the trial, counsel asked at the outset of the proceedings for permission to approach the bench. This exchange occurred:

> COUNSEL: For the sake of the record, we, of course, are not ready for trial. And I have this morning handed your clerk a motion, a written motion, for a continuance or, in the alternative, to dismiss the indictment on the grounds of the defense being forced into a summary trial in this matter. I also filed today a motion for suppression of evidence.
>
> THE COURT: Why wasn't that filed before?
>
> COUNSEL: For the simple reason, Your Honor, we just over the weekend decided that that had enough merit so that it should be filed. I have articulated in my written motion for a continuance, at least briefly, some of the problems we have been having.
>
> THE COURT: At arraignment there was a time given within which to file motions and a time set for those motions. No motion was filed within that time. And I am unwilling to hear any motion

to suppress evidence on the morning of trial with a jury sitting here waiting, and I am unwilling to continue the matter.

For those reasons, the motion will be denied.

B.

The defendants relied almost exclusively in their motions for continuance on the asserted complexity of the evidence in the case. The complexity of a case is undoubtedly one of the circumstances to be considered in deciding whether to grant or deny a motion for continuance. We are not prepared to say, however, that the district judge acted arbitrarily in concluding on the facts presented to him that three weeks was an adequate time in which to prepare a defense in this case.

Of the nine tax returns on which the prosecutions were based, six were the individual returns of the Badwans. Those returns merely reflected an equal division of the partnership profits of VITC. As to the partnership returns, the district court may simply have concluded that the amounts involved suggested some limits to the complexity of the case. The indictments charged

that the correct amount of partnership profits was $29,109.13 for 1973, $20,994.48 for 1974 and $24,586.71 for 1975. The Badwans reported partnership profits for those years of $4,096, $6,300 and $13,568.

There are other factors here that support the district court's denial of the motions as at least not arbitrary. First, there is defense counsel's silence at arraignment when the trial date was set. Counsel may not have known then of the particular problems he would face in this case, but he must be assumed to have known of the potential complexity of any tax fraud prosecution. He must also be assumed to have known of the likely difficulty of hiring an accountant during the month of March to review the government's computations and analysis. A district judge, aware of the same facts of life, and entitled, as he must be, to assume counsel's zeal in protecting his client's interest, must ordinarily then be entitled to draw the obvious inference from counsel's silence in the face of clear opportunity to signal

concern. From these practical considerations has emerged the general principle that an attorney having a substantial claim for a continuance should move for continuance as early as possible. United States v. Uptain, 531 F.2d 1281, 1290-91 (5th Cir. 1976). The later the motion is made the more disruptive will be any continuance granted, and the more likely may it reasonably appear to the judge that the motion is made for dilatory purposes. All this must be taken into account in assessing claims of arbitrariness in denying a continuance, and here it militates against defendant's claim.

Second, the defendants have never shown in any concrete way how they were prejudiced by the denial of the continuance. They have argued to us that further investigation "could have led to many innocent explanations for the alleged understatements." We must be reluctant to find arbitrariness in the exercise of trial court discretion based upon no more than post-hoc assertions by counsel that given more time something might have turned up.

See, e.g., United States v. Uptain, 531.F.2d 1281 (5th Cir. 1976); United States v. Schwanke, 598 F.2d 575, 579-80 (10th Cir. 1979). This case is not, for example, like Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975), where it was demonstrated that the testimony of an unavoidably absent witness would, if believed, have led to the defendant's acquittal.

We do not believe that the denial of a continuance here so clearly violated fundamental fairness or deprived the Badwans of the effective assistance of counsel as to compel a conclusion that it constituted an abuse of discretion.

II

The defendants also contend that the district court abused its discretion in denying, without a hearing, their motion to suppress evidence made on the morning of trial. The motion was based on asserted violations of Miranda V. Arizona, 384 U.S. 436 (1966) in interviews held by an I.R.S. agent with the Badwans. The defendants assert that a hearing on voluntariness was required by Johnson v. Dennc, 378 U.S. 368

(1964). Under Rule 12(b) (3) and (f) of the Federal Rules of Criminal Procedure, the failure to raise these claims before trial constituted a waiver. The defendants argue that the district court should have granted them relief from the waiver, as Rule 12(f) allows; that the early trial date made it impossible to have adequately researched and prepared the suppression motion before trial. None of the considerations that made the issue of the denial of continuance at least an arguable one are present here. The complexity of the other evidence in the case should not have affected defense counsel's ability to challenge the voluntariness of statements by his clients.

We believe that the nine days from arraignment to the time for submission of pre-trial motions was sufficient for preparation of the motion for suppression.

III

The defendants' last contention is that the statute only applies to one who "willfully makes and subscribes" a false tax return. 26 U.S.C. Sec. 7206 (1).

They argue that the evidence clearly showed that they did not "make" the return, but rather that the returns were prepared by an accountant hired by them. The evidence did clearly show, however, that the accountant who prepared the returns did so solely on the basis of information provided to him by the Badwans, and that the Badwans then signed and filed the returns. This satisfies the statute.

Having found no error on any of the points raised, we affirm the convictions.

AFFIRMED.

WINTER, Circuit Judge, dissenting:

I respectfully dissent. As I analyze and understand the record in this case, I am ineluctably led to conclude that the district court abused its discretion in denying the requested continuance.

I.

The record shows that, after four years of investigation and preparation on the part of the government, the case against the Badwans culminated in the return of a nine-count indictment on March 5, 1979. The indictment covered the tax years 1972, 1973 and 1974. Four days later (Friday, March 9), the Badwans, residents of North Carolina and non-residents of the district in which they were indicted and subsequently tried, retained counsel. Prior to then they were unrepresented. One day after retaining counsel, they journeyed to Virginia to meet with him. The conversation when they met was concerned principally with now to post bail when they were arraigned the following

Monday, March 12, 1979. At their arraignment the district court fixed a schedule whereby pretrial motions were to be filed by March 21, were to be heard on March 23 and the trial was to begin on April 3. Counsel lodged no objection to this schedule.

Counsel was in no way dilatory following the arraignment. Two days thereafter (March 14), he met with the prosecutor. Then he learned that the government had eight volumes of trial exhibits that it intended to use at trial. He was allowed to copy only the documents which had been furnished by his clients. His request for other documents was not immediately honored. Two days after that meeting (March 16), the prosecutor invited counsel to meet with the special agent investigating the case; and that meeting was scheduled for March 20.

In the interim, counsel met with the defendants on Saturday, March 17. After further discussions with them, it became apparent that an intensive investigation of their case would be required including the employment of an

accountant. On Monday, March 19, seven days after the arraignment and ten days after being retained, counsel communicated with an accounting firm and arranged to meet with them on March 23.

At this stage of his preparation, the course of events impressed upon counsel the need for a continuance. Accordingly, on March 20, he filed a written motion for a continuance. It recited that it was impossible for counsel to gather all necessary materials, much less review them, prior to the date for the filing of motions (March 21), and, furthermore, only after they were obtained, could an accountant begin working with counsel to prepare the case for trial. Counsel asked for additional time in which to file motions and a continuance of the trial date from April 3 to a date in late April or early May. The district court denied the motion by order and without comment on the same day it was filed. Also on that day, the prosecutor advised counsel that he could copy certain, but not all, government exhibits that he had requested.

Counsel met with the accountant on March 23, and the next day the accountant, who was a former IRS agent, spent two and one half hours reviewing the documents at the prosecutor's office. As a result of the review, the accountant, although unable to reach a conclusion as to the accuracy of the government's computations, had no difficulty in concluding that he could not perform his function in the time remaining for trial. By his letter dated March 29, the accountant stated that it was his firm's professional opinion that "it would take several weeks to perform a thorough review of the Government's calculations," emphasizing that there were in excess of one hundred exhibits and thousands of entries which related to nine United States tax returns, filed during a three year period.

The accountant's letter, in conjunction with the slow and laborious review of the available government records, convinced defense counsel that a continuance was both necessary and imperative to insure a proper defense.

Thus, on the day of trial (April 3), counsel filed another motion for a continuance. It recited the reasons previously assigned and added that while the government purported to rely on the bank deposits method of proving the indictments, there were indications that the net worth system was being used and neither counsel nor the accountant had had an opportunity to analyze the case in this light. To support the assertion that the case was complex and that additional time was needed for an accounting analysis, the accountant's letter of March 29 was attached to the motion. The district court summarily denied the motion, and it is inferable from the record that the motion was never read.*

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*The transcript indicates that the remarks of the district judge were directed solely to an accompanying motion to suppress. There was a respectful request from counsel that the court read "at some appropriate time" the motion for continuance and the accountant's letter. The district judge never asserted familiarity with either.

Thereafter, the trial immediately began. Defense objections were few. Although there was some examination of the government's witnesses, no witnesses were called for the defense. In the cross-examination of the witnesses, there were no questions relating to the substance of the government's bank deposits/cash expenditures analysis. Throughout the trial counsel repeatedly informed the court that he lacked copies of the exhibits from which a government witness was testifying. Apparently, counsel's complaints were well founded; the district court scolded the government for its disorganized presentation and stated that "this is one of the sloppiest cases I have ever seen."

II

In deciding this case, we must apply the familiar rule that a motion for continuance is within the sound discretion of the district court and its exercise of its discretion will not be

disturbed unless there is a clear abuse of discretion. Where, as here, the claim is that the denial of the continuance resulted in inadequate preparation time, the factors to be considered as to whether there was an abuse of discretion have been identified in the opinion in United States v. Uptain, 531 F.2d. 1281, 1286-87 (5 Cir. 1976), a case which the majority also treats as a definitive one:

> We have deemed the following factors highly relevant in assessing claims of inadequate preparation time: the quantum of time available for preparation, the likelihood of prejudice from denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, and the availability of discovery from the prosecution. We have also explicitly considered the adequacy of the defense actually provided at trial, the skill and experience of the attorney, any pre-appointment or pre-retention experience of the attorney with the accused or the alleged crime, and any representation of the defendant by other attorneys that accrues to his benefit. (footnotes ommitted.)

In my view these factors in this case aggregate an abuse of discretion. The attorney, who had neither previously represented these defendants nor had ready access to them, was employed with reasonable promptness. He was given three weeks to prepare for the trial of an income tax case which involved primarily the partnership returns of an enterprise for three years. The government intended to prove a willful understatement of tax by the bank deposit or the net worth method. Although counsel promptly sought informal discovery from the government, this was effectively withheld until two weeks before trial. When discovery was given, it was incomplete and it appeared that the government intended to prove eight volumes of exhibits, comprising in excess of one hundred exhibits which reflected thousands of entries. Even before informal discovery was gained, counsel recognized the need for an accounting expert, and he exercised due diligence in recruiting such a witness. When the witness, whose qualifications and good faith are not challenged,

inspected the government's proof, it was his professional opinion, unchallenged on this record, that it would take several weeks to complete a review of the government's calculations. In seeking a continuance counsel did not ask for a long delay. His request was for a delay of approximately one month.

The majority is of the view that the case was not complex. I would conclude otherwise. The extent of the government's documentary and statistical proof proves that the case was complex. While the issue of partnership profits for each of three years may seem elementary, how the figure was reached is not. There were issues of how the government reached its conclusions; what methods were used; what evidence it accepted, rejected or neglected. I think it is simply inaccurate to characterize a four year investigation, producing eight volumes of exhibits, as simple. I also emphatically reject the amounts in controversy as an accurate measure of the complexity of the issues. Certainly they are no reflection of the value of the

constitutional guarantees which were swept away if the continuance was improperly denied.

It is, of course, true that counsel voiced no objection to the schedule prescribed by the district court for motion and trial, but I find his silence completely understandable. By the date of promulgation of the schedule, he manifestly had less than complete knowledge of what the case was all about. He had no basis on which to represent that he could not meet the schedule, and it would have been irresponsible for him to represent that he needed more time. From his silence, I would infer a good faith intention on his part to meet the schedule if humanly possible, and a not unreasonable confidence (unfortunately misplaced) that the district court would not require him to adhere to the schedule if he could subsequently demonstrate that it was too restrictive. His first request for a continuance was only eight days after the arraignment and eleven days after he was first retained.

Similarly, I would take no comfort

from the inability of the defendants to show with specificity how they were prejudiced by denial of the continuance. Insufficient time to prepare constitutes prejudice. Here the essence of defendants' claim is that despite promptness and dispatch on their part and that of their attorney, they were denied the opportunity to prepare their defense. Their pitiful showing at trial is eloquent testimony to that fact. If they knew what was their defense, they would have had no need for the expert and they would not thus have been unconstitutionally precipitated into trial. To me it is illogical to reason that they were not harmed by the denial of the delay because they cannot show what benefit to themselves the delay would have generated had it been granted. This is not the case where the delay was sought to explore the strength of the government's case against them and to determine if they had a meritorious defense. Certainly the Constitution guaranteed them that right.

In the view that I take of the case, it is unnecessary for me to discuss the other issues.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 79-5144

United States of America, Appellee,

versus

Minwer A. Badwan Appellant.

No. 79-5145

United States of America, Appellee,

versus

Rawhi A. Badwan, Appellant

O R D E R

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Butzner. Judge Winter dissents.

For the Court,

/s/ William K. Slate, II

CLERK

Filed August 29, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.		CRIMINAL NO.
	)	79-32-A
MINWER A. BADWAN	)	

MARCH 1979 TERM - AT ALEXANDRIA

THE GRAND JURY FURTHER CHARGES:

That on or about the 10th day of April, 1974, in the Eastern District of Virginia, MINWER A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly, make and subscribe a United States partnership tax return, Form 1065, for the calendar year of 1973, which was verified by written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said partnership tax return he did not believe to be true and correct as to every material matter, in that the said return reported partnership income in the amount of $6,300.00, whereas he then and there well knew the correct amount

of partnership income was $20,994.48.
(Violation of Title 26, United States Code, Section 7206(1))

COUNT II

THE GRAND JURY FURTHER CHARGES:

That on or about the 8th day of April, 1975, in the Eastern District of Virginia, MINWER A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly, make and subscribe a United States partnership tax return, Form 1065, for the calendar year 1974, which was verified by a written declaration that it was made under the penalties of perjury and filed with the Internal Revenue Service, which said partnership tax return he did not believe to be true and correct as to every material matter, in that the said return reported partnership income in the amount of $13,568, whereas he then and there well knew the correct amount of partnership income was $24,586.71.
(Violation of Title 26, United States Code, Section 7206(1))

COUNT III

THE GRAND JURY FURTHER CHARGES:

That on or about the 17th day of April, 1973, in the Eastern District of Virginia, MINWER A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly, make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1972, which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct in every material matter in that the said return reported gross income from a partnership of $2,048.00, whereas he then and there well knew and believed he received substantial income in addition to that heretofore stated.

(Violation of Title 26, United States Code, Section 7206(1))

COUNT IV

THE GRAND JURY FURTHER CHARGES:

That on or about the 8th day of April, 1974, in the Eastern District of

Virginia, MINWER A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly, make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1973, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported partnership income in the amount of $3,150.00, whereas he then and there well knew and believed, he received substantial income in addition to that heretofore stated.

(Violation of Title 26, United States Code, Section 7206(1))

COUNT V

THE GRAND JURY FURTHER CHARGES:

That on or about the 10th day of April, 1975, in the Eastern District of Virginia, MINWER A. BADWAN, a resident of Vienna, Virginia, did willfully and

knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1974, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported gross income from his partnership in the amount of $6,784.00, whereas as he then and there well knew and believed he received substantial income in addition to that heretofore stated.

(Violation of Title 26, United States Code, Section 7206(1))

A TRUE BILL:

_____

FOREMAN

/s/William B. Cummings

United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL
	)	NO.79-33-A
RAWHI A. BADWAN	)	

MARCH 1979 TERM - AT ALEXANDRIA

THE GRAND JURY FURTHER CHARGES:

That on or about the 17th day of April, 1973, in the Eastern District of Virginia, RAWHI A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly make and subscribe a United States partnership tax return, Form 1065, for the calendar year 1972, which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said partnership tax return he did not believe to be true and correct as to every material matter, in that the said return reported partnership income in

the amount of $4,096.00, whereas he then and there well knew the correct amount of partnership income was $29,109.13.

(Violation of Title 26, United States Code, Section 7206(1))

COUNT II

THE GRAND JURY FURTHER CHARGES:

That on or about the 17th day of April, 1973, in the Eastern District of Virginia, RAWHI A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year 1972, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported gross income from a partnership in the amount of $2,048.00, whereas as he then and there well knew and believed, he

received substantial income in addition to that heretofore stated. (Violation of Title 26, United States Code 7206(1))

COUNT III

THE GRAND JURY FURTHER CHARGES:

That on or about the 8th day of April, 1974, in the Eastern District of Virginia, RAHWI A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly make and subscribe a United States individual income tax return, Form 1040, for the calendar year of 1973, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct in every material matter, in that the said return reported gross income from a partnership in the amount of $3,150.00, whereas as he then and there well knew and believed, he received substantial income in

addition to that heretofore stated. (Violation of Title 26, United States Code 7206(1))

COUNT IV

THE GRAND JURY FURTHER CHARGES:

That on or about the 10th day of April, 1975, in the Eastern District of Virginia, RAWHI A. BADWAN, a resident of Vienna, Virginia, did willfully and knowingly make and subscribe a United States individual income tax return, form 1040, for the calendar year 1974, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which was said income tax return he did not believe to be true and correct in every material matter in and that the said return reported gross income from a partnership in the amount of $6,784.00, whereas he then and there well knew and believed, he received substantial income in addition to that

heretofore stated.
(Violation of Title 26, United States Code 7206(1))

A TRUE BILL

_____

FOREMAN

s/William B. Cummings
WILLIAM B. CUMMINGS
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria

UNITED STATES OF AMERICA	)	
	)	
V.	)	NO.
	)	79-32-A
MINWER BADWAN	)	
UNITED STATES OF AMERICA	)	
	)	
V.	)	NO.
	)	79-33-A
RAWHI A. BADWAN	)	

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PRE-TRIAL MOTIONS AND MOTION FOR CONTINUANCE FOR TRIAL DATE

The Defendants in the above-entitled cases, by and through counsel Lawrence P. Lataif, repectfully move this Court to grant an extension of time up to and including April 2, 1979 within which to file pre-trial motions. These same Defendants also respectfully move this Court to

continue the trial date from its presently scheduled date of April 3, 1979. As grounds for this motion, counsel states:

1. These two Defendants are charged with nine separate counts of violations of 26 U.S.C. 7206(1)). The indictments allege that the Defendants knowingly filed partnership and individual income tax returns for a three year period (1972-74) knowing that the information contained in said returns was false.

2. Both Defendants are presently residing and working in the area of Raleigh, North Carolina.

3. On March 9, 1979, counsel was retained by both Defendants to represent them in this matter. This fact is brought to the Court's attention to indicate that counsel had no opportunity to investigate or research this case prior to the arraignment.

4. On March 12, 1979, both Defendants were arraigned and released on $5,000.00 personal recognizance.

5. On Wednesday, March 14, 1979, counsel met with Assistant United States Attorney John Greaney to begin pre-trial discovery. During that conference, counsel was presented with volumes of trial exhibits covering hundreds if not thousands of pages. Counsel reviewed those documents briefly on March 14. Counsel was given copies only of written statements made by the Defendants. Counsel requested at that time copies from the Government of other selected exhibits to review with the Defendants in preparation for trial.

6. On Friday, March 16, AUSA Greaney called to invite counsel to meet with the special agent in charge of investigating the case. That meeting has since been scheduled for Tuesday, March 20, 1979. The United States Attorney's office has not yet decided whether on not it will give counsel copies of the selected additional exhibits which have been requested.

7. On Saturday, March 17, 1979, counsel met with the Defendants in his

offices to review the discovery received thus far. During that meeting, it became clear that defense investigation will be required, including, but not limited to, the hiring of an accounting firm to review the available materials.

8. It presently appears to counsel that it will be impossible to even gather all necessary material, much less review them, prior to the present due date for motions of Wednesday, March 21. Only following the receipt and review of those documents can pre-trial motions be formulated. Also, only following receipt of those documents can an accountant begin working with counsel to evaluate and prepare the case for trial.

9. In light of the complexity of the case (e.g. the number of Government exhibits and the fact that the indictment covers nine different tax returns over a period of three years) counsel is compelled to request the additional time within which to file motions and a continuance of the

trial date from April 3 to a date in late April or early May. With the exception of the the week of May 7 (when counsel will be out of the country on business) counsel will make arrangements to be available on any trial date convenient to the Court during that period.

RESPECTFULLY SUBMITTED

/s/

LAWRENCE P. LATAIF

Suite 407
1400 North Uhle Street
Arlington, Virginia 22201
527-7750

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing has been hand delivered this 20th day of March, 1979 to AUSA John Greany, 117 South Washington Street, Alexandria, Virginia, 22314

/s/
LAWRENCE P. LATAIF

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA

UNITED STATES OF AMERICA	)	
	)	
V.	)	No. 79-32-A
	)	
MINWER BADWAN	)	
	)	
UNITED STATES OF AMERICA	)	
	)	
V.	)	NO. 79-33-A
	)	
RAWHI BADWAN,	)	
	)	

MOTION FOR A CONTINUANCE OR IN THE ALTERNATIVE MOTION TO DISMISS INDICTMENT

The defendants in the above cases, by and through counsel, respectfully renew their request for a continuance of trial presently set for April 3, 1979. In the alternative, these defendants respectfully move this Court to dismiss the indictments in these cases on constitutional grounds enumerated below.

The Defendants incorporate herein by reference all of the allegations and statements made in the previous Motion for Extension of Time Within Which to File Pre-Trial Motions and Motion for Continuance of Trial Date which was filed by them previously and summarily denied by this Court.

The Defendants are charged with a total of nine counts of violations of 26 U.S.C. 7206(1). The allegations contained in the indictments cover nine different tax returns filed over a three year period (1972, 1973, and 1974).

They include both partnership returns and individual returns filed by each of these defendants for each of these three years. In spite of the best efforts of defendants' counsel since entering this case, including working evenings and weekends, the defense is not ready for trial.

The Government has had a full six years to investigate and prepare this case for trial. The defense has been given by this Court three weeks to investigate and prepare its case for trial. This means approximately 3 1/2 days of preparation for the defense to each year of preparation by the Government!

To attempt to articulate all the reasons why the defense needs more time to prepare this case is somewhat analagous to attempting to state what is on the other side of a mountain that the defense has not yet been given the opportunity to climb. However, since defense counsel's first discovery conference with the Government on March

14, 1979, the following has appeared:

1. The Government appears to be relying on the bank deposits method of proving the allegations in the indictments. However, the Government's files also contain indications of the use by the Government of the net worth system for determining the violations alleged in these indictments.

2. The defense promptly secured the services of a large and reputable certified public accounting firm in Arlington to assist in the evaluation, understanding and preparation of these cases. As the attached letter from that firm indicates, a substantial additional period of time would be required before that firm could intelligently and adequately evaluate this case. [See attached letter dated March 29, 1979, from Stephen Dakes of Brown, Dakes and Company.]

3. The Government's files in this case consist of hundreds of exhibits containing thousands of entries which have been used to determine the allegations contained in the

indictment. A thorough review of these files would be required following the receipt of the accountant's reports and discussions with those accountants. This process whould also have to include lengthy and precise comparison of the Government's files with the records of the defendants and with the defendants themselves.

4. Using due diligence and best efforts, counsel has attempted to investigate several procedural avenues before even reaching the possible substantive defenses. These procedural avenues have included statute of limitations problems, technical defects in the indictment, possible Miranda type violations by the Government, and research and review of the intricate legal distinctions between tax negligence, civil tax fraud and criminal tax fraud. In addition, there have been rather extensive explorations with the Government of possible disposition of this case without trial. In the time allotted by this Court for trial preparation, the defense has been unable to reach a final position on these

issues or to prepare jury instructions

5. On the substantive merits of the case, a thorough review of the Government's files would be critically and directly relevant to the elements of the offenses charged in the indictments. These elements include the wilfullness of the defendants' actions, the element of "knowing" that the information contained therein was false, and the specific intent to defraud the Government which is required under the statutes involved. Time has simply not permitted adequate defense preparation of these points.

6. There has been no determination of the civil tax liability which may be involved in this case. While the specific amount of unpaid taxes need not be proved to sustain a criminal indictment, certainly if the defense is able to show that little or no tax would be due on the tax returns in question, this evidence would be highly relevant in the criminal case as it relates to the issue of wilfullness and intent to defraud.

7. Furthermore, the defense has

had no opportunity yet to investigate the non-taxable sources of income which may be involved in the bank deposits contained in this case. Such non-taxable sources of income include personal injury settlements, proceeds received from sales of residences, loans, pre-existing funds and transfers from one account to another.

8. Furthermore, the most important witness for the Government in this prosecution would probably be the accountant who was in charge of all of the defendants' bookkeeping for all of the years in question. It would be impossible to question this individual intelligently without first having a firm grasp of the accounts involved and the bookkeeping system in effect.

9. Also, the defense has had no opportunity to question the third parties that would be used at trial of this case. These include the various suppliers of the defendants and the various wholesale and retail customers of the defendants.

10. Due to an inadequate opportunity to prepare for trial, the

defense is not able at the present time to stipulate to the authenticity of Government exhibits or secure character witnesses.

11. It is useful to point out that the Government files do not allege any secret bank accounts maintained by the defendants or any significant amounts of cash which the Government discovered in the possession of the defendants. The basic thrust of the Government's case derives from a detailed examination of the bank accounts which the defendants openly used during the periods in question. This fact is significant for the purposes of this motion because it indicates that the defense cannot adequately prepare for trial by focusing in on one dramatic or major "discovery" which the Government made in order to form the basis for the allegations that the defendants knowingly and wilfully signed tax returns which they knew to be false.

12. It is of course conceded that defendants did not have counsel until arraignment on March 12, 1979. Nor can it be successfully argued by the

Government that they waived their right to counsel during the pre-indictment investigation. The defendants were never advised of any Miranda rights until February 10, 1975. Prior to that date they had only been advised of the possibility of "assessing additional tax". On February 10, 1975 when some warnings were first given about a possible criminal proceeding, the agent began the warnings by indicating that he wanted to question them "in connection with my investigation of your tax liability(or other matter)". This artful use of language was either deliberately or accidentally intended to mislead the defendants into thinking that the civil audit was proceeding in normal fashion. In fact, the defendants would testify before this Court that they first learned that the indictments served upon them were criminal in nature when they were so advised by present counsel immediately prior to arraignment.

For the above reasons, counsel repectfully requests an additional period of two weeks for filing pre-trial

motions and approximately six weeks to prepare adequately for the trial of this case.

In the alternative, the defendants respectfully move this Court to dismiss the indictments in the above cases on the grounds that forcing them to go to trial on April 3 would constitute a summary trial that would deny them various constitutional rights. These rights include the right to counsel, the right to prepare a defense, the right to have compulsory process for obtaining witnesses in their favor, the right to confront witness against them, the right to cross-examine witnesses, the right to decide intelligently whether or not to exercise their Fifth Amendment rights to testify or not to testify at trial and the Due Process right to fundamental fairness in a criminal proceeding

RESPECTFULLY SUBMITTED,

/s/

LAWRENCE P. LATAIF
SUITE 407
1400 North Uhle Street
Arlington, Virginia 22201
527-7750

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion for Continuance on in the Alternative Motion to Dismiss Indictment has been hand delivered this 3rd day of April, 1979 to AUSA John Greaney, U.S. Attorney's Office, 117 South Washington Street, Alexandria, Virginia.

/s/

LAWRENCE P. LATAIF

BROWN, DAKES AND COMPANY
Certified Public Accountants
2030 16th St, North
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Members
American Institute of CPA's
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Martin E. Brown, CPA (Ret.)
Stephen G. Dakes, CPA
Harvey E. Johnson, Jr., CPA

March 29, 1979

Mr. Lawrence Lataif, Esq.
1400 N. Uhle Street
Arlington, VA 22201

On March 19, 1979 I was contacted by Lawrence Lataif as to the possibility of our firm, Brown, Dakes and Company, CPA's reviewing certain documents and workpapers involving a case for which Mr. Lataif had been retained.

The engagement was assigned to Harry Dougherty, a Certified Public Accountant employed by our firm and a former Internal Revenue Service Agent. Mr. Dougherty met with Mr. Lataif on Friday, March 23, 1979 and discussed the extent

of work to be performed regarding the case involving R. and M. Badwan. At this time Mr. Dougherty was given copies of depositions of the parties involved for his review.

On March 24, 1979 Mr. Dougherty met Mr. Lataif and Messrs. Badwan at the United States Attorneys office in Alexandria, Virginia at which time he reviewed the exhibits compiled by the Government. Approximately 2 1/2 hours were spent reviewing the aforementioned exhibits.

Due to the limited time made available on March 24, 1979 for the review Mr. Dougherty was unable to arrive at any conclusion as to the accuracy of the Government's computations.

Additionally, because of the heavy volume of Mr. Dougherty's work load in March and April since the filing deadline for individual and most partnership United States Income Tax Returns is April 16, 1979 he was unable to return to the United States

Attorney's office for any further analysis of the Government's work product.

It is our professional opinion that it would take several weeks to perform a thorough review of the Government's calculations in that there are in excess of one hundred Government exhibits and thousands of entries which relate to a three year period and the nine United States Income Tax Returns which were filed.

Sincerely,

BROWN, DAKES AND COMPANY

/s/Stephen G. Dakes

Stephen G. Dakes, Partner

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
V	)	No. 79-32-A
MINWER BADWAN	)	
UNITED STATES OF AMERICA	)	
V	)	NO. 79-33-A
RAWHI BADWAN	)	

MOTION FOR NEW TRIAL, MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION TO DISMISS MULTIPLICITOUS COUNTS OF THE INDICTMENTS

The defendants in the above cases, by and through counsel Lawrence P. Lataif, respectfully move this Court to grant a new trial or to grant a motion for judgment of acquittal after discharge of the jury pursuant to Rules 33 and 29(c) respectively of the Federal Rules of Criminal Procedure. As grounds for this motion, counsel states:

PART I. SUMMARY TRIAL

1. Two separate written pre-trial motions were filed requesting a continuance of the trial. Both motions were summarily denied by the Court.

2. A motion to suppress was filed by counsel on the morning of trial and also was summarily denied by the Court.

3. The actual trial of this case has demonstrated beyond peradventure of doubt that both of these defendants were denied the most basic elements of due process during this trial and were deprived of all the constitutional rights which were set forth in the earlier written requests for a continuance of the trial.

4. The trial in this case required

preparation and trial by three government prosecutors including the United States Attorney for the Eastern District of Virginia and two of his assistants. In spite of a minimum of four years of actual preparation of this case by the Government [see trial testimony of Agent Salisbury], this Court felt compelled to note on the record that the Government's preparation of the case at trial was completely inadequate and confusing to both the Court and jury. The Court further remarked that this case was one of the worst prepared that the Court has ever observed! The Court took further note of the fact that the confusion in the minds of the jury could well prejudice the defense as well as the Government.

This pathetic and prejudicial situation existed in spite of the fact that there were three attorneys and the Government's chief investigator at Government counsel table throughout the trial.

5. While the Government with all its resources could not adequately prepare its case for jury presentation

with four years of actual preparation and six years of potential preparation time, the defendants and their counsel were forced to go to trial with less than three weeks of preparation time!

6. At trial, because of inadequate opportunity to prepare, the defense was unable to present any defense witnesses. It was unable to cross-examine Agent Salisbury on the very essence of the charges, namely the validity of his calculations concerning the alleged understatements made by the defendants on their tax returns. The defense was unable to cross-examine other government witnesses effectively. The defendants themselves were unable to invoke their right to testify because of inadequate opportunity to prepare themselves for that testimony and cross-examination by Government counsel.

7. During the trial itself, the record is replete with numerous examples of the Court admonishing Government counsel for their failure to provide the defendants with copies of the actual Government exhibits introduced at trial. In fact, even as of the time of

the filing of this motion, the defendants and their counsel have not been provided by the Government with copies of all of the exhibits which the Government introduced at trial and which were sent to the jury during their deliberations! In short, it should now be clear to the Court that these defendants were forced into a summary trial with a totally inadequate opportunity to prepare.

8. It is inconceivable to counsel that this Court would deprive the Government of a reasonable opportunity to prepare for trial if the situation were reversed. The injustice to these defendants is even more striking when it is contemplated that no possible prejudice to the Government or this Court could have resulted from granting the defendants a reasonable opportunity to prepare to defend themselves on these felony charges.

WHEREFORE, for the above stated reasons, counsel respectfully requests that a motion for judgment of acquittal be granted or that a new trial in this

case be ordered.

PART II. MIRANDA WARNINGS

9. As noted above, counsel filed on the morning of trial a Motion to Suppress Evidence based on inadequate "Miranda" warnings given by the Government to the defendants during the investigatory stages of this case. As to the Court's denial of the motion as untimely filed, counsel can only hope that the Court now recognizes the inadequate opportunity for pre-trial preparation and would treat the Motion as timely filed and consider that Motion on its merits.

10. As to the merit of that Motion, the testimony of Agent Salisbury at trial demonstrated that the Government was guilty of affirmative misconduct and misfeasance in this case. The warnings given by Agent Salisbury constituted what can only be characterized as a blatant untruth in advising the defendants that he was "investigating their tax liability". As Agent Salisbury admitted, this statement was patently false, misleading and deceiving

on its face. Agent Salisbury's testimony clearly demonstrated that the warnings had their intended effect, namely that they misled and deluded the defendants into cooperating with the Government by creating the false impression that Agent Salisbury was merely seeking their records for the purpose of determining their "tax liability."

11. Whether or not the warnings as given could, in the abstract, pass constitutional muster, it was patently clear from Agent Salisbury's testimony that these particular defendants did not understand the rights which they had. It was also patently clear that Agent Salisbury knew that they did not understand the rights which they had under the Constitution. Therefore, even assuming arguendo that the language recited by Salisbury would be constitutionally acceptable in the abstract, the particular facts of this case place an additional burden upon the Government to clarify the obvious ambiguity which it had created so as to reasonably assure that the defendants 1)

knew what their rights were and 2) knowingly and intelligently waived those rights.

WHEREFORE, both defendants request that judgment of acquittal be entered as to all counts of both indictments since virtually all evidence against the defendants was tainted by the improper Government conduct.

PART III. MULTIPLICITOUS COUNTS

12. The defendants also respectfully move this Court to dismiss the multiplicitous counts in the indictments returned against the respective defendants.

13. The defense contends that each defendant can be deemed to have committed only one criminal act for each of the three years in question. Yet the Government has charged the defendants with a separate criminal offense for the partnership informational return as well as each defendant's individual tax return for each year. Under these circumstances, the Government is forced to elect which tax return it wishes to

rely upon for the purposes of criminal prosecution. United States v. Crane, 529 F.2d 1236 (5th Cir. 1976).

14. The activities alleged against each defendant for each year constituted one transaction. Therefore, separate offenses may not be carved out of the single incident for each year. If there is any doubt, it must be resolved against turning a single transaction into multiple offenses. United States v. Crane, id..

15. Even accepting the Government's theory of this case, the defense contends that this case is analagous to a perjury case in which an individual may repeat the same untrue statement numerous different times in the course of his testimony in a given trial. Certainly, that individual would not be subject to indictment on a separate count for each occasion on which he repeated the same untruth in the same testimony. Nor can the Badwans be subjected to separate counts for each tax return which contained the same understatement for the very same year. See also United States v. Dudley, 581

F.2d 1193 (5th Cir. 1978).

WHEREFORE, the defendants respectfully request that this Court force the Government to elect which non-multiplicitous counts it wishes to use as the basis for the conviction in this case, with the Court dismissing the remainder of the counts. In the alternative, the defendants request that the Court sua sponte make a determination as to which counts are multiplicitous and that they be dismissed by the Court.

RESPECTFULLY SUBMITTED,

/s/

LAWRENCE P. LATAIF
Suite 407
1400 North Uhle Street
Arlington, Virginia 22201
703-527-7750

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion for New Trial, Motion for Judgment of Acquittal and Motion to Dismiss Multiplicitous Counts of the Indictments has been hand delivered this 17th day of April, 1979 to the office of the United States Attorney, 200 S. Washington Street, Alexandria, Virginia.

/s/
LAWRENCE P. LATAIF

SPEEDY TRIAL ACT
18 U.S.C. 3161

Sec.3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d) (1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise

dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the

passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161 (h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section

3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provision of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163 (a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such

time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to --

(A) delay resulting from any proceedings, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of

title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation,

and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an

essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his wherabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the

date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance

outweigh the best interest of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unsual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of facts or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the

arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161 (b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part

of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal insitiution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial:

or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of

the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney or the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Governnment (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

26 U.S.C.7206.
Fraud and false statements

Any person who--

(1) Declarations under penalties of perjury.--- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.--- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.--- Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.---Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in the respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.---In connection with any compromise under section 7122, or offer of such compromise, or in connection

with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property.--- Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.--- Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Aug.16, 1954, c.736, 68A Stat.852.

No. 80-709

JAN 5 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

MINWER A. BADWAN AND RAWHI A. BADWAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' motions for a continuance of their trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 12a-35a) is reported at 624 F. 2d 1228.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1980. A petition for rehearing was denied on August 29, 1980 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on October 27, 1980. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 5, 1979, a grand jury returned an indictment against petitioner Minwer A. Badwan charging him with five counts of violating Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) by filing false income tax returns (Pet. App. 38a-42a). On the same day, the grand jury also returned a four-count indictment against petitioner Rawhi A. Badwan for violating the same statute (Pet. App. 43a-47a). Following a jury trial, petitioners were convicted as charged. Both were sentenced to three-year terms on the first count, with all but six months thereof suspended in favor of three years' probation. On each of the remaining counts, petitioners received suspended sentences of three years' imprisonment and three years' probation to run concurrently with the probation terms imposed under the first count (A. 223-226).[1] The court of appeals affirmed (Pet. App. 12a-35a).

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[1] "A." refers to the appendix filed in the court of appeals.

Four days after their indictment, on March 9, 1979, petitioners retained counsel (Pet. App. 49a). They were arraigned on March 12. At that time, the district court ordered that pretrial motions be filed within 10 days and heard on March 23. Counsel for petitioners offered no objection to these dates. Trial was set for April 3 after the court and counsel had agreed that that was a mutually satisfactory date (Tr. 1-7).[2]

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[2]"Tr." refers to the transcript of the arraignment proceedings.

The following colloquy took place during the arraignment proceedings (Tr. 5):

THE COURT:
I'll consolidate the cases for trial and set it for trial with a jury March 28th.

[Defense counsel]:
Your Honor, I have a jury trial in Fairfax on the 28th of March.

THE COURT:
The 21st?

[Defense counsel]:
I have depositions that afternoon in a rather important case. Any time the week of April 2nd, except for Monday, would be available.

THE COURT:
April 3rd?

[Defense counsel]:
Very well.

THE COURT:
Set for trial with a jury on April 3rd. I'll direct that any motions that ought to be filed in the case be filed within ten days. I'll set those motions for March 23rd.

[Defense counsel]:
Very well, Your Honor.

Two days later, on March 14, the prosecutor met with petitioners' counsel. Petitioners' counsel was permitted to review the government's files, which contained the original or a copy of every trial exhibit. At that time, counsel chose only to review these documents "briefly." Counsel was also given a copy of every written statement made by petitioners. On March 16, counsel was invited to meet with the special agent in charge of the investigation of the case. That meeting was later rescheduled for March 20 (Pet. App. 50a). By letter dated March 20, defense counsel also was notified that he would be permitted to copy various government exhibits (A. 22-23). On that same date, petitioners first sought a continuance. They requested that the March 21 deadline for filing motions be extended until April 2 and that the trial be delayed until late April or early May (Pet. App. 48a-52a). This motion was denied on the same day (A. 21).

On March 24, petitioners, their counsel and an accountant[3] spent two and one-half hours reviewing the government's files. During the remaining ten days before trial, however, it appears that no further attempts were made to examine these records (Pet. App. 64a-66a).

On the morning of the trial, petitioners filed a second motion for a continuance, in which they requested an additional two weeks to file pretrial motions and an additional six weeks to prepare for trial (Pet. App. 54a-63a). The district court denied the motion and proceeded with the trial (Pet. App. 3a).

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[3]Petitioners' counsel first contacted the accountant on March 19 (Pet. App. 64a).

ARGUMENT

Petitioners seek review of their convictions on the ground that they were denied due process of law by the district court's refusal to grant them a continuance.

1. Contrary to petitioners' suggestion (Pet. 20-22), the law in this area is well settled. This Court established the applicable standards to be applied by trial and appellate courts in *Ungar* v. *Sarafite*, 376 U.S. 575, 589-590 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery* v. *Alabama*, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler* v. *Fretag*, 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva* v. *United States*, 352 U.S. 385; *Torres* v. *United States*, 270 F. 2d 252 (C.A. 9th Cir.); cf. *United States* v. *Arlen*, 252 F. 2d 491 (C.A. 2d Cir.).

Accord, e.g., United States v. *Collom*, 614 F. 2d 624, 634 (9th Cir.), cert. denied, 446 U.S. 923 (1980) *United States* v. *Leavitt*, 608 F. 2d 1290, 1293-1294 (9th Cir. 1979); *United States* v. *Davis*, 604 F. 2d 474, 480-481 (7th Cir. 1979); *United States* v. *Tissi*, 601 F. 2d 372, 374 (8th Cir. 1979); 3 C. Wright, *Federal Practice and Procedure, Criminal* ffl 832 (1969 & Supp. 1979) (and cases cited therein).

As the foregoing authorities make clear, in determining whether to grant or deny a motion for a continuance, the trial judge must look to the facts of the particular case. While, as petitioners point out (Pet. 14-16, 20-22), factors that are considered determinative by one court are often not even mentioned by another,[4] this is not the result of any inconsistency. Rather, it is the result of the fact that "each decision necessarily turns on the particular facts and circumstances of the case." *United States* v. *Davis, supra*, 604 F. 2d at 480; see *Ungar* v. *Sarafite, supra*, 376 U.S. at 589; *United States* v. *Leavitt, supra*, 608 F. 2d at 1293-1294; *United States* v. *Tissi, supra*, 601 F. 2d at 374; *United States* v. *Burton*, 584 F. 2d 485, 490-492 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Rothman*, 567 F. 2d 744, 747-749 (7th Cir. 1977). An inflexible standard, as urged by petitioners, would therefore be inappropriate.

2. Before this Court, *amici* assert (Br. 2-3, 14) that the present case is but one example of the practice followed in the Eastern District of Virginia of routinely denying meritorious motions for continuances. If, in fact, such a problem exists in that district, it is plainly a matter to be dealt with in the first instance by the court of appeals rather than this Court. *Amici*, however, did not file in the court of appeals, and the asserted problem was not otherwise brought to that court's attention. There is no need for this Court to pass upon the validity of a particular district court's practice until the court of appeals for the circuit in which the district is located has had an opportunity to do so.

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[4]For a summary of the various factors courts have considered, see *United States* v. *Burton*, 584 F. 2d 485, 490-491 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

3. In any event, as the court of appeals found (Pet. App. 1a-24a), the district court's denial of petitioners' motions for a continuance does not require reversal of their convictions.

An appellate court reviewing the denial of a continuance may reverse the trial court only if there is a clear abuse of discretion. See, *e.g.*, *Ungar* v. *Sarafite, supra*, 376 U.S. at 589; *United States* v. *Henderson*, 588 F. 2d 157, 159 (5th Cir.), cert. denied, 440 U.S. 975 (1979); *United States* v. *Uptain*, 531 F. 2d 1281, 1285 (5th Cir. 1976). Indeed, this Court has stated that the trial court's decision ordinarily is not even subject to review. *Avery* v. *State of Alabama*, 308 U.S. 444, 446 (1940); accord, *United States* v. *Davis, supra*, 604 F. 2d at 480.

Here, petitioners have not alleged any specific facts demonstrating that they actually were prejudiced by the district court's denial of their motions for a continuance.[5] Rather, petitioners appear to contend that, given more time, they might have been able to uncover evidence to refute the government's case.[6] This failure to specify prejudice is in

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[5]In their petition for rehearing filed in the court of appeals (at 8), petitioners did point to some specific items that they contended were erroneously included in the government's calculations of their income. Those items, however, constituted only a small percentage of the total amount of unreported income with which petitioners were charged. Moreover, a conviction under 26 U.S.C. 7206(1) does not require proof of any exact amount of unreported income. See *United States* v. *Johnson*, 319 U.S. 503, 517-518 (1943); *United States* v. *Wilson*, 601 F. 2d 95, 99 (3d Cir. 1979); *United States* v. *Warden*, 545 F. 2d 32, 36 (7th Cir. 1976); *United States* v. *Roselli*, 432 F. 2d 879, 897 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Thus, even if all of these allegations were accepted as true, the main outlines of the government's case against petitioners would remain intact.

[6]The petition for a writ of certiorari was filed more than one year and seven months after petitioners were indicted. Their petition for rehearing in the court of appeals was filed more than one year and three months after they were indicted. Surely, petitioners have had adequate time to find some evidence that they were materially prejudiced, if that is in fact the case, particularly when their failure to do so was pointed out to them by the Fourth Circuit (Pet. App. 21a-22a).

itself fatal to their claim. See, *e.g.*, *Avery* v. *State of Alabama*, *supra*, 308 U.S. at 452-453; *United States* v. *Schwanke*, 598 F. 2d 575, 579-580 (10th Cir. 1979); *United States* v. *Smith*, 591 F. 2d 1105, 1110 (5th Cir. 1979); *United States* v. *Medina-Arellano*, 569 F. 2d 349, 353-354 n.3 (5th Cir. 1978); *United States* v. *Riebold*, 557 F. 2d 697, 702 (10th Cir. 1977), cert. denied, 434 U.S. 860 (1977).[7]

Evidence that the district court did not abuse its discretion is also found in the transcript of the arraignment proceedings. At that time, petitioners' counsel was sufficiently familiar with their case to assure the district court that he could foresee no potential conflict of interest in his representing both petitioners (Tr. 4). Petitioners' counsel himself suggested that the trial be held during the week of April 2 (see note 2, *supra*). At that point, counsel at least was aware of the nature of the charges against petitioners and must be assumed to have understood the problems inherent in a criminal tax fraud case, including the fact that an experienced accountant is often necessary in such cases. Nonetheless, petitioners' counsel not only failed to contact an accounting firm until a full week after he himself was retained, but also failed to make full use of the time prior to trial to review the government's evidence. Thus, it is plain that if petitioners' counsel actually did not know about some of the government's exhibits prior to trial, any surprise by their production at trial was due to his own failure

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[7]Petitioners and *amici* argue (Pet. 18; Brief of *amici* 8) that the government has failed to prove that the grant of a continuance would have prejudiced its case or the court. The burden of proof, however, is on petitioners. See *Ungar* v. *Sarafite*, *supra*, 376 U.S. at 591.

to utilize adequately the time he had. That failure is particularly perplexing in light of counsel's knowledge that the district court did not routinely grant continuances (Pet. App. 16a).

Moreover, petitioners' allegations that this was a highly complex case are questionable at best. Of the nine tax returns involved in this case, six were petitioners' individual tax returns, which were relevant only as to the amount of partnership income actually reported. The dispute centered around the three partnership returns on which the government demonstrated that petitioners had failed to report substantial amounts of income. Additionally, much of the evidence used by the government was from petitioners' own records (A. 208-212).

4. Finally, any decision by the Court in this case is unlikely to have any prospective precedential value. Effective August 2, 1979, 18 U.S.C. 3161(c) was amended by the Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, Section 2, 93 Stat. 327 to provide:

> (2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Thus, the specific legal issue presented in this case (of a defendant's being tried, over his objection, within 22 days of his arraignment) has largely been rendered moot.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

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[8]Enactment of a statute requiring at least 30 days between arraignment and trial does not mean that trials conducted before the effective date of the statute were deficient if they began within thirty days after arraignment. The 22-day period between arraignment and trial in this case was not drastically shorter than that provided for by the Speedy Trial Act Amendments. In any event, petitioners did not ask for merely eight days more than the 22 they were given, but for several weeks. Thus, even if the statute had applied, it would not have entitled petitioners to the continuance they contend was necessary.

DOJ-1981-01

Supreme Court, U. S.
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No. 80-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MINWER A. BADWAN
AND
RAWHI A. BADWAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION and VIRGINIA AFFILIATE OF AMERICAN CIVIL LIBERTIES UNION

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QUESTION PRESENTED

What standards should guide the discretion of a trial judge in the grant or denial of a continuance in a criminal case where:

(a) The request is not made for delay; and

(b) No unreasonable delay is necessitated; and

(c) Where defense counsel has been reasonably diligent in attempting, unsuccessfully, to procure evidence for the defense; and

(d) Where a continuance is necessary to allow the defense to seek the aid of experts or other witnesses who are reasonably necessary to effectuate an adequate defense; and

(e) Where counsel's actual performance, while not so grossly defective as to violate the Sixth Amendment right to counsel, is nonetheless less than reasonably effective, and

(f) The case is complex, and its nature calls for complex expert advice, the character of which cannot be predicted fully in advance.

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a. the request is not made for delay; and

b. no unreasonable delay is necessitated; and

c. where defense counsel has been reasonably diligent in attempting, unsuccessfully, to procure evidence vital for the defense; and

d. where a continuance is necessary to allow the defense to seek the aid of experts of other witnesses who are

Page

personally necessary to effectuate an adequate defense; and

e. where counsel's actual performance, even if not so grossly defective as to violate the Sixth Amendment's Right to Counsel, still is less than reasonably effective; and

f. the case is complex, and it's nature calls for complex expert advice, the character of which cannot be predicted fully in advance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-709

MINWER A. BADWAN

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RAWHI A. BADWAN,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION and VIRGINIA AFFILIATE OF AMERICAN CIVIL LIBERTIES UNION

INTEREST OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION AND VIRGINIA AFFILIATE OF AMERICAN CIVIL LIBERTIES UNION

The Virginia Trial Lawyers Association is an organization formed in 1960, now consisting of 2,282 members of the Virginia Bar. It is not a partisan organization, is not an affiliate of any other association, and its membership and governing bodies include prosecutors, defense counsel (civil and criminal) and plaintiffs' lawyers.

The Virginia Affiliate of the American Civil Liberties Union is an organization of lawyers and laymen sharing common interests and goals fostering civil rights and civil liberties in this country.

We are jointly concerned with the policy of some judges in the Eastern District of Virginia in pressing criminal defendants precipitously to trial before an opportunity for adequate investigation can be made. Continuances, however reasonable, are routinely denied. As trial lawyers, we are acutely aware of the need for adequate preparation to produce an effective defense. Even the diligent must have adequate time. Expeditiousness is one thing, but riding "roughshod over the right of defendants to prepare for trial" and present a defense is quite another. *Gavino* v. *United States,* 499 F2d 1191, 1196 (2d Cir. 1974).

As trial lawyers and civil libertarians we seek uniform guidelines from the Supreme Court that will strike a delicate balance, giving due consideration to the right to adequately prepare a defense against the public's right to a speedy and just determination. The issue cuts both ways. Prosecutors occasionally will need continuances to prepare strong cases against wrongdoers.

SUMMARY OF ARGUMENT

We do not lightly intervene in this action. As representatives of many experienced Virginia trial and appellate lawyers, we know that the grant of a continuance is within the sound discretion of the trial judge; only in rare circumstances will an appellate court find an abuse of that discretion. Protection of fundamental constitutional rights, however, is not a matter of discretion. Where a federal judicial district elevates expediency above the interest of the public in fair criminal proceedings, and *routinely* denies well-

founded requests for more pretrial preparation, then there is a compelling need for this Court to take remedial action.

The only *effective* way to assure fair trials is to provide the accused with the *effective* assistance of counsel.

Experience has taught that a defendant's constitutional rights are mere platitudes unless given meaning and life by the courts. Implicit in the concept of due process is the requirement that an accused be afforded opportunity to *effectively* explore his avenues of defense. Thus, the touchstone of analysis in cases where it is alleged that the accused has been denied a fair trial and the effective assistance of counsel because of a trial court's denial of a continuance request must be whether the accused was accorded the *meaningful* use of his constitutional trial rights.

Where defense counsel has represented the accused with due diligence and makes a reasonable request for additional preparation time in a complex criminal case involving voluminous government evidence, and where no prejudice to the public is claimed, then fundamental fairness requires that the request be granted, particularly when trial can still be conducted within 70 days of arraignment, the period provided for a "speedy trial" under the Speedy Trial Act.

This case, and the policy of the Eastern District of Virginia of unnecessarily rushing criminal defendants to trial, sufficiently threatens Constitutional values and the administration of justice to require the Court's exercise of its supervisory powers, in this case, and reversal on the merits.

INTRODUCTION

The facts of this case, and the general principles of law relating to continuances and preparation time necessary for the effective assistance of counsel, have been fully stated in the opinions below and the Petition for Certiorari. *Badwan*

v. *United States,* No. 80-709 (hereafter Petition) pp. 4-10, 15a-20a, 25a-30.

ARGUMENT

A Unified Federal Standard Is Needed To Govern Defense Requests For Additional Preparation Time To Assure The Effective Assistance Of Counsel And Fair Trials

A. Pretrial Preparation Is The Key To Effective Assistance Of Counsel

Preparation is the key to effective representation. The Sixth Amendment's guarantee of "assistance of counsel" is designed to assure the defendant "effective aid in the *preparation and* trial of the case." *Powell* v. *Alabama,* 287 U.S. 45, 71 (1932). This means that the defendant must be accorded a meaningful opportunity to counter the government's case.

Thorough preparation requires familiarity with both the facts and the law.

> Generally, an attorney can be effective in a trial only to the extent that he has the *information* necessary to *plan* effectively. . . . Where planning is foreclosed by lack of information, as has long been the custom in much of criminal litigation, surprise and gamesmanship usually govern the conduct of the proceedings.
>
> *American Bar Association Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial,* Commentary Section 1.1(a)(iii) (Approved Draft 1970) (hereafter, ABA Standards)

Powell v. *Alabama* made clear that the Sixth Amendment guarantee of assistance of counsel demands an in-

[1] Italics added here and below.

quiry "whether the defendants were *in substance* denied the right of counsel." 287 U.S. at 52.

The Court noted:

> during perhaps the most critical period of the proceedings . . . that is from the time of their arraignment until the beginning of their trial, when consultation *and thorough-going investigation* and preparation were vitally important, the defendants did not have the aid of counsel in any real sense.

Id. at 57.

Whenever counsel has been required to work under circumstances that render his services ineffective, the Court has not hesitated to intervene. *Geders* v. *United States,* 425 U.S. 80 (1976); *Brooks* v. *Tennessee,* 406 U.S. 605 (1972); *Ferguson* v. *Georgia,* 365 U.S. 570 (1961).

Preparation in petitioners' case required a full review and analysis of the government's voluminous exhibits, many not made available to the defense until trial itself. Petition, pp. 7, 10; Circuit Judge (Winter's dissent), Petition, 30a.

The reluctance of the government to make available to the defense copies of its intended trial exhibits a reasonable time before trial should not prejudice defendants. Here, as soon as defense counsel realized he needed the help of an accountant in preparation of the case, he moved for a continuance, only eight days after arraignment and fourteen days before the scheduled trial date. Compare the government's advantage: it took four years to investigate the case and assigned three attorneys to prosecute it. Surely the defense should have been allowed sufficient time to seek expert analysis of the government's mass of documents. Could any defense lawyer try such a case without the help of an experienced accountant?

Of course "the pretrial gathering of such information is

a vital part of the effective assistance of counsel." A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* 1-284 (1977). *Accord, Coleman* v. *Alabama,* 399 U.S. 1, 9 (1970). The commentary to the ABA Standards, § 4.1, p. 227-8, says:

> The relationship of effective investigation by the lawyer to competent representation is patent, for *without adequate investigation* he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial. . . [*W*]*ithout careful preparation he cannot fulfill his role.*

It is difficult for counsel in any case to assess his own effectiveness. The fact that petitioners' counsel appealed on the ground that he had inadequate time to prepare reveals his own view that his performance, given enough time, would have been better. As Judge Winter said in his dissent below:

> "Defense objections were few. Although there was some cross-examination of the government's witnesses, no witnesses were called for the defense. In the cross-examination of the witnesses, there were *no* questions relating to the substance of the government's bank deposits/cash expenditures analysis. Throughout the [defense] counsel repeatedly informed the court that he lacked copies of the exhibits from which a government witness was testifying. Apparently, counsel's complaints were well founded; the district court scolded the government for its disorganized presentation and stated that 'this is one of the sloppiest cases I have even seen.' " Petition, p. 30a.

The lack of any meaningful defense is bad. Worse yet is the cursory nature of the cross-examination of prosecution witnesses.

"Uninformed cross-examination is worse than no cross-examination at all." A. Amsterdam, *supra* p. at 1-285. This principle is implicit in the Court's opinion in *United States* v. *Wade,* 388 U.S. 218, 227, 229-32, 235 (1967).

Defense counsel's performance in this case may not have been so grossly defective that it violated defendants' Sixth Amendment rights to assistance of counsel. However, the Court can focus on the quality of petitioners' legal assistance in determining whether the trial judge abused his discretion in denying them a continuance. Reviewing courts should be more alert to reversal where the defense is rendered less than reasonably effective by inadequate time to prepare a defense. *Gandy* v. *State of Alabama,* 569 F.2d 1318 (5th Cir. 1978).

B. The Effective Assistance Of Counsel Mitigates Against The Unequal Balance Of Resources In The Criminal Justice System.

The formidable ability of a government to amass its investigative and prosecutorial resources against an individual has occasioned the recognition that the due process clause of the Fifth Amendment "does speak to the *balance of forces* between the accused and the accuser." *Wardius* v. *Oregon,* 412 U.S. 470, 474 (1973). A commendable goal of jurisprudence has been to keep "the balance true" in a criminal prosecution. *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934) (Cardozo, J.).

This inherent imbalance of resources must be taken into consideration in assessing a defense request for more preparation time, based upon a demonstrated need[2] to review a mass of financial documents in possession of a government reluctant to make them available. In a tax fraud case,

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[2] See letter of accounting firm to trial counsel, Petition pp. 64a-66a.

and in *any* complex litigation, documentary evidence is usually the crux of the case. If defense counsel, despite the exercise of due diligence, is unable to analyze sufficiently the government's relevant computations, analysis and conclusions because of a shortage of time, the court should grant the defense a reasonable extension.

The abuse of discretion by the District Court is further shown by the lack of any demonstration of prejudice to the government as grounds for denying the continuance. Moreover, the later trial date proposed by the defense was *still* within seventy days of arraignment, the outer reach of a timely trial under the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). Recent amendments to the Act now prohibit trial within thirty days of arraignment without the defendant's consent, 18 U.S.C. § 3161(c)(2) (1979), thus evidencing Congress' determination that less than 30 days is often inadequate to prepare an effective defense.

C. A Trial Court Cannot Apply Standardless Discretion In Disposition Of Requests For Continuance.

Ungar v. *Sarafite,* 376 U.S. 575, 589 (1976), states a self-evident general principle relevant to requests for a continuance, but fails to provide any standards by which discretion may be meaningfully exercised. The result is a hodge-podge of standards as numerous as the circuit courts announcing the rules. Petition, pp. 20-22.

This Court has condemned the standardless exercise of discretion by officials in varying contexts. *E.g., Kunz* v. *New York,* 340 U.S. 290, 294 (1951); *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940). The same principles compel the conclusion that a trial court must similarly rely on discernible standards in exercising a discretion which impacts upon an accused's constitutional rights.

Judicial discretion, while often wide, is not absolute. As Chief Justice Marshall said long ago:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a *mere legal discretion,* a discretion to be exercised in *discerning the course prescribed by law;* and, when that is discerned, it is the duty of the court to follow it."
>
> *Osborn* v. *Bank of the United States,* 22 U.S. 738, 866 (1824).

Thus, the idea of "discretion" is not a license to run a court as a judge wishes; it cannot shield action inconsistent with the Constitution or the policies enunciated by Congress.

The need to avoid unbounded discretion is greater when *constitutional* rights are at stake. For this reason, courts of appeals have reversed convictions where trial courts' abuses of discretion infringed defendants' constitutional rights. *House* v. *Mayo,* 324 U.S. 42, 45-46 (1945); *Gavino* v. *MacMahon,* 491 F.2d 1191 (2d Cir. 1974); *United States* v. *Ploeger,* 428 F.2d 1204 (6th Cir. 1970) (defendant forced to trial ten days after indictment).

Gavino is most analogous to petitioners' case. The trial judge refused a continuance request in a multi-defendant drug case involving voluminous documentary evidence and less than a month to prepare for trial. The Second Circuit entertained the appellant-defendant's application for a writ of mandamus noting the "readily apparent *absence of any justification* for the district court's action." 499 F.2d at 1195.

> "Without minimizing the importance of the public interest in prompt disposition of criminal cases, we cannot allow our concern with calendar dispatch to triumph over a defendant's right to a fair trial, which is the foundation of our system of justice. To sacrifice a

> fair trial to the interest of expedition would surely undermine the true administration of justice."

Id. at 1196.

The record below is devoid of any indication that the District Judge Bryan exercised discretion in Chief Justice Marshall's sense of the term (p. 9 *supra*). The judge denied defendants' motion by order, without comment, on the same day the motion was filed. He denied another motion for a continuance on the date of trial, the record suggesting that he did so *without even reviewing the motion.* Petition, pp. 7, 9, 29a. If the District Court was guided by *any* standards in the exercise of its discretion, the record does not reveal what they were.

D. Standards Should Be Set By This Court For Complex Cases To Guide The Discretion Of The Trial Judge Where:

(a) The request is not made for delay, and

(b) No unreasonable delay is necessitated, and

(c) Where defense counsel has been reasonably diligent in attempting, unsuccessfully, to procure evidence vital for the defense, and

(d) Where a continuance is necessary to allow the defense to seek the aid of experts or other witnesses who are reasonably necessary to effectuate an adequate defense, and

(e) Where Counsel's actual performance, even if not so grossly defective as to violate the Sixth Amendment's right to counsel, still is less than reasonably effective?

(f) The case is complex, and its nature calls for complex expert advice, the character of which cannot be predicted fully in advance.

Several Courts of Appeals have attempted to enunciate standards of reversing trial courts' refusal to grant continuances. *Delaney* v. *United States,* 199 F.2d 107 (1st

Cir. 1952); *Everitt* v. *United States,* 281 F.2d 429 (5th Cir. 1960); *J. E. Hanger, Inc.* v. *United States,* 160 F.2d 8, 81 U.S. App. D.C. 408 (1947); *Gavino* v. *MacMahon,* 499 F.2d 1191 (2d Cir. 1974); *Gandy* v. *State of Alabama,* 569 F.2d 1318 (5th Cir. 1978). While action on an application for a continuance is generally within the *sound* discretion of the trial court, such discretion is not unlimited, and must be ". . . in accordance with fixed legal principles and with a view to promoting substantial justice, and in such a manner as to prevent injustice and oppression". 17 C.J.S. *"Continuances"* p. 379. Unfortunately ". . . appellate courts have sometimes overstrained the point in the latitude they have accorded to the determination of the trial judge on matters of this sort" *Delaney, supra,* 199 F.2d at 115.

None of the cases cited here, or in the Petition for Certiorari, gives much in the way of standards for the trial courts to follow. Perhaps the most complete are found in *Gandy, supra,* 569 F.2d at 1324, where it was said:

> "While what is a 'fair or reasonable opportunity' [for preparation] depends upon all the surrounding circumstances, some factors to be considered include: (1) the *length* of the requested delay; (2) whether the lead counsel has an *associate* who is adequately prepared to try the case; (3) whether *other* continuances have been requested or granted; (4) the *balanced* convenience or inconvenience to litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a *legitimate reason,* or whether it is dilatory and contrived; (6) whether there are other unique factors present."

The factors listed in *Gandy* are helpful, but not all courts follow the Fifth Circuit's lead on this. Furthermore, these standards are not sufficiently specific to focus on the kind of problem found at bar where the short continuance re-

quested was necessary to obtain expert advice central to the trial in question.

Amici suggest a more precise rule that accounts for the need for experts, particularly in complex documentary cases where the need in general is demonstrable even though the specific need in a specific case may be difficult to delineate.

We have already discussed counsel's performance as one criterion for reversal of a denial of a continuance where the lack of time causes an inept performance where the lack of time causes an inept performance that yet survives a Sixth Amendment "incompetence" attack. Other factors likewise suggest criteria.

The request must not be made only for the purpose of delaying the proceedings. Here, counsel made his request promptly after learning the facts and discovering the need for expert analysis which could not be completed within the time constraints of the trial date. Some may argue that counsel should have realized the complex generic nature of this type of case, and should have pleaded for more time *at arraignment*. Such a half-informed plea would have been *irresponsible*. Employed over the preceding weekend, counsel knew little of the specific facts of the case. To have pleaded for more time based solely on the generic complexity of tax fraud cases would have flouted counsel's duty to accommodate and to be candid with the court and would have been poor tactics. Furthermore, the court should be expected to be *more* sensitive to the generic complexity of certain kinds of cases than *counsel*—most lawyers try *few* complex cases, judges try *many*.

No unreasonable delay was asked here; only a *short* one. The trial date could have been reset well within the seventy days mandated by the speedy trial act.

The record discloses that defense counsel was reasonably diligent in attempting to procure defense evidence and to prepare the case.

One feature peculiar to complex tax fraud, securities, antitrust and other complex white collar crime cases is the large amount of documentary evidence necessary to prosecute or defend. In a simpler case the anticipated testimony usually can be set out by affidavit in a motion for continuance, and the trial judge has a basis for granting or denying the continuance. But in the complex document case, the expert's findings and opinions cannot be predicted until the analysis is done. Defendant is put in a quandary. He claims the need for witnesses and expert advice, but cannot state how they will ultimately help his case. Yet such help generally is a necessity for any successful defense in such a case.

E. The Threat To Justice In A Routine Practice Of Denying Continuances Without Applying Any Standard Other Than Expeditiousness Is Sufficient To Require This Court's Exercise Of Its Supervisory Powers.

This Court bears ultimate responsibility for overseeing the administration of justice in the federal courts. Should it determine that the *Constitution itself* does not require the application of guiding standards to a trial court's determination of a continuance request, *amici* respectfully urge the Court to exercise its *supervisory* powers and formulate workable standards to guide trial court discretion.

> The scope of our reviewing power over convictions brought here from the federal courts is *not* confined to ascertainment of *Constitutional* validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of *establishing and*

> *maintaining civilized standards of procedure* and evidence.

McNabb v. *United States*, 318 U.S. 332, 340 (1942).

Judge Winter's strong dissent below, the record in this case and the general policy of the Eastern District of Virginia to *routinely* deny reasonable continuance requests, amply illustrate the need for this Court to intervene in the interest of the administration of justice.

Petitioners' case does not represent an isolated incident but rather the unfortunate and unnecessary result of a "myopic" insistence of expeditiousness characteristic of the Eastern District of Virginia where some of the district judges grant a continuance only in the rarest of circumstances.[4]

In *Fletcher* v. *United States*, No. 79-5068 (4th Cir. appeal pending), for example, local counsel, who had not participated in any pretrial defense preparation or consultation, was forced to trial in a multi-defendant, complicated drug case *five days* after being informed by retained counsel that retained counsel would be unable to try the case. The same district judge whose ruling is being challenged here *refused* local counsel's request for a continuance and/or a severance.

Expeditiousness in criminal proceedings is best effectuated through liberal discovery procedures and cooperation rather than competition between opposing counsel. Expeditiousness is only frustrated by a policy which encourages the government to take full advantage of surprise at

[4] Of all judicial districts with 25 or more criminal cases on the annual docket, the Eastern District of Virginia ranked *second* in speed in resolving jury and bench trials. The median time for resolving jury trials nationally is 5.2 months. The Eastern District of Virginia averages *2.4 months*—half as long! Annual Report of the Director of the Administrative Office of the United States Courts. 418 (1978). See Appendix A, p. App. 1, *infra*.

trial with the concommitant delay resulting when the trial must recess in order to allow the defense sufficient time to review documents which should have been disclosed prior to trial. See, *United States* v. *Algie,* 28 Cr.L. Rep. 2149 (E.D. Ky. Oct. 1, 1980).

The rationale underlying the argument in support of liberal discovery is:

> based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.

Wardius v. *Oregon,* 412 U.S. 470, 473 (1973).

In a similar vein, the ABA Standards call for maximum cooperation and disclosure in criminal discovery. Sections 1.1(a) (i) and (iii), 1.2(a) and (b) and accompanying Commentary (Approved Draft 1970); *ABA Standards Relating to the Prosecution Function and the Defense Function,* § 3.11(b), 4.1 and accompanying Commentary (Approved Draft 1971). These standards which represent over a decade of intensive study and work by more than a hundred of the nation's leading jurists, scholars and lawyers "offer the best prospect of meaningful improvement of our criminal justice system in this generation and their legal community." Burger, *Introduction: The ABA Standards for Criminal Justice,* 12 Am. Crim. L. Rev. 251 (1974).

Despite the admonition that "the prosecutor should seek in good faith to make [discovery procedures] function fairly and effectively," *ABA Standards Relating to the Prosecution Function* Section 3.11(b) (Approved Draft 1971), the prosecutors in this case *withheld the most vital of the government exhibits* from the defense, not revealing the

exhibits until trial itself. Such conduct makes a mockery of the accused's right to the effective assistance of counsel and dignifies the sporting theory of criminal justice. *See* Brennan, *The Criminal Prosecution, Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279.

The fundamental importance of the effective assistance of counsel to our scheme of justice requires that the Court formulate workable guidelines to aid courts and defendants in determining the need for a continuance in any given circumstances. Continuances may still be delegated to the trial courts' discretion, but it must be a *sound* discretion, rooted in *standards* that safeguard the accused's fundamental right to a fair trial.

The approach of the Court of Appeals in looking for *prejudice* to the accused misses the mark, for where the defense is denied adequate opportunity to prepare, not only the defendant but the public at large loses. Due process demands not only that justice be done, but that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Where there is any doubt, the Court must resolve the doubt in favor of the accused since there is no way to tell "what a prompt and thoroughgoing investigation might disclose as to the facts." *Powell* v. *Alabama*, 287 U.S. 45, 58 (1932). *See Effective Assistance of Counsel*, 8 Seton Hall L. Rev. 562 (1977) (defendant need not bear burden of proof on issue of prejudice).

This court has criticized the requirement that an accused demonstrate prejudice where the action complained of denies the accused the effective assistance of counsel:

> The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser v. *United States,* 315 U.S. 60, 76 (1942); *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant a writ of certiorari and set this case down for briefing and argument, or, in the alternative, that certiorari be granted and the conviction below summarily reversed. Rule 23.1.

Respectfully submitted,

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APPENDIX A

Statistics Regarding Disposition Of Criminal Cases Comparing The Eastern District Of Virginia To National Averages.

According to the 1978 *Annual Report of the Director of the Administrative Office of the United States Courts,* the Eastern District of Virginia ranks second to all districts, in speed from filing to disposition of court trial cases, taking an average of .8 months to dispose of all criminal cases. The Middle District of Georgia was first with an average time of .6 months, handling, however, only 53 cases to 118 handled by the Eastern District of Virginia.

The average time for all 95 districts from filing to disposition of court cases is 3.2 months. The Eastern District of Virginia disposes of their court cases on an average of 2.4 months faster than most other districts.

Looking at the disposition of jury trials for 1978, the Eastern District of Virginia again ranks second in speed with only the Eastern District of Oklahoma moving jury trials faster. Where the average amount of time for all districts is 5.2 months, the Eastern District of Virginia averages 2.4 months.

If ranked according to Circuits, the 4th Circuit moves both court and jury trials faster than any other Circuit. It should be noted as well that the median time from filing to disposition for all other Circuits was substantially longer.